Supreme Court, U.S.
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No. 94-488

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHN FREDERICK DORMAN,
Petitioner,

v.

EMERSON ELECTRIC COMPANY,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KENNETH R. HEINEMAN
(Counsel of Record for Respondent)
BRUCE D. RYDER
One Mercantile Center
Suite 2900
St. Louis, Missouri 63101
(314) 621-8575

Of Counsel:
COBURN & CROFT

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

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SUMMARY OF ARGUMENT

This Court should deny the Petition for Writ of Certiorari in this case because the issue it presents, whether this Court should formulate and impose a uniform federal choice-of-law rule, was not raised in the Court of Appeals. Furthermore, the position argued by Petitioner was rejected by this Court more than fifty years ago, on the grounds that this Court lacks the power to create rules of federal common law to replace the rules of general common law formulated by the courts of the several states.

ARGUMENT

This case involves a personal injury claim by Petitioner John Frederick Dorman ("Dorman"), a citizen of Canada, against Respondent Emerson Electric Company ("Emerson"), a Missouri corporation with its principal place of business in Missouri.[1] Dorman alleged that he was injured in British Columbia, Canada while using a power miter saw designed by Emerson. Dorman filed an action against Emerson in the United States

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[1] Emerson has no parent companies. Its nonwholly owned subsidiaries are: Aichi-Emerson Electric Co.; Astec (BSR) PLC; Controles Electromecanicos De Mexico; Digital Appliance Controls Korea, Inc.; Asco India Limited; Ascomatica S.A. de C.V.; Branson Korea Co., Inc.; Ohkura-Rosemount Co., Ltd.; Rosemount Holding AG; Rosemount AG; Rosemount A/S; Rosemount (India) Limited; Rosemount Instruments Malaysia SDN BHD; Rosemount Instruments Pty. Ltd.; Rosemount Instruments Ltd.; Rosemount S.A.R.L.; Rosemount Portugal S.A.; Rosemount Shanghai Co. Limited; Valmet-Rosemount Inc.; Xomox (India) Limited; Emerson Empreendimentos E Participacoes Ltd. (EEPL); Dinatorque S.A. de C.V.; Emerson Electric (U.K.) Limited; Hocking Holdings Ltd.; Hocking NDT Limited; Nippon Hocking; AB Robotics Ltd.; Copeland Fluid Power Ltd.; Irish Pneumatic Services Ltd.; Leroy-Somer S.A.; Bertrand-Polico S.A.; Atelier de Bobinage de Moteurs Electriques S.a.r.L; Construction Electriques du Nord S.A.; Lorraine Services Electrique Electronique Electromecanique S.A.R.L.; M.I.S. Kerebel Provence S.A.R.L.; Marcel Oury S.a.r.L.; Navarre Services S.A.R.L.; Ouest Electro Service S.A.R.L.; Radiel Bobinage S.A.R.L.; Societe Peaucelle D'Installations et Reparations Electriques S.A.R.L.; Leroy-Somer Burban Argentina S.A.; Leroy-Somer Maroc S.A.; Societe Anonyme de Mecanique et D'outillage du Vivarais S.A.; Societe Con Folentaise de Metalurgie S.A.; Societe de Mecanique et D'Electromthermie des Pays de L'Adour S.A.; Societe Commerciale des Ateliers de Constructions Electriques D'Orleans S.A.R.L.; Shanghai Branson Co. Limited; Ferco S.A; Fisher Controls A.G.; Tianjin Fisher Valve Co. Ltd.; Nippon Fisher Company Ltd.; Oval Engineering Co. Ltd.; Precision Connector Designs, Inc.; Krautkramer Japan Ltd.; Motorvenca - Emerson Motors, CA (VENEMCA); Samsung-Emerson Electric Co. Ltd. (SEECO); Swequipos, S A.; Componentes Avanzados de Mexico, S.A. de C.V.; Transmisiones de Potencia Emerson S.A. de C.V.; Tsubakimoto Emerson Co.; Vermont American Corporation.

District Court for the Eastern District of Missouri, basing jurisdiction on diversity of citizenship pursuant to 28 U.S.C. § 1332(a)(2). The district court, applying Missouri choice-of-law rules, held that Canadian law applied and dismissed Dorman's claims based on breach of warranty premised on Section 400.2-314, R.S.Mo. (1986), strict products liability, and *res ipsa loquitur*. *Dorman v. Emerson Electric Co.*, 815 F. Supp. 1287 (E.D. Mo. 1993). The United States Court of Appeals, Eighth Circuit, affirmed that decision, while reversing the district court's inadvertent dismissal of Dorman's negligence claim. *Dorman v. Emerson Electric Co.*, 23 F.3d 1354 (8th Cir. 1994).

Dorman has now petitioned this Court for a writ of certiorari. Dorman does not claim that the courts below incorrectly applied Missouri choice-of-law rules, nor that the courts below misapplied Canadian law. Instead, he argues for the first time that the district court should have applied a federal choice-of-law rule that would have required this case to be decided under Missouri substantive law. For the reasons stated below, this argument should be rejected, and Dorman's petition should be denied.

I. THE PETITION SHOULD BE DENIED BECAUSE THE QUESTIONS PRESENTED FOR REVIEW WERE NOT RAISED BELOW.

Dorman presents for review by this Court the question of whether this Court should formulate a uniform choice-of-law analysis among the states. Petition for Writ of Certiorari at i. Dorman, however, never raised this issue in either of the courts below. Indeed, in his brief in the Eighth Circuit, Dorman began his argument by stating: "When determining whether Canadian or Missouri law should apply, the Court must apply Missouri's choice of law rules." Appellant's Brief at 15.

This Court's normal practice is to refrain from addressing issues not raised in the Court of Appeals. *See, e.g., EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986);

Rogers v. Lodge, 458 U.S. 613, 628 n.10 (1982). Dorman has shown no reason why this practice should not be followed in this case. It is improper to ask this Court to adopt a rule with such far-reaching implications as a uniform federal choice of law rule without having developed the arguments for and against such a rule in the lower courts. This is particularly true when, as here, the rule Dorman asks this Court to adopt is contrary to clear precedent established by this Court more than fifty years ago. This Court should deny the Petition for Writ of Certiorari.

II. THE PETITION SHOULD BE DENIED BECAUSE THIS COURT LACKS THE POWER TO IMPOSE A FEDERAL CHOICE-OF-LAW RULE IN DIVERSITY ACTIONS.

Currently, each state formulates its own choice-of-law rules, and federal district courts must apply the choice-of-law rules of the state in which they sit. Dorman asks this Court to change the present system, arguing that it results in confusion and uncertainty for companies and individuals operating in the international marketplace. Dorman's unusual solicitude for companies such as Emerson masks his dissatisfaction with the fact that Missouri choice-of-law rules require the application of Canadian law to his claims against Emerson. In any event, this Court lacks the power to grant the relief Dorman seeks in his Petition, the creation of a uniform federal choice-of-law rule.

The basis for the current system of determining choice of law in diversity cases in federal courts is *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). In that case, this Court unequivocally rejected the idea that federal courts could develop a federal general common law in diversity cases that was different from the state law that would otherwise be applicable.

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be

> declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

304 U.S. at 78.

The principles of *Erie* were applied to choice-of-law issues in *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). In that case, a federal district court sitting in Delaware decided to apply a New York statute in a diversity case pending before it. The court of appeals affirmed, based on that court's independent determination of the applicable law without regard to Delaware law. This Court reversed and remanded the decision for determination of the choice-of-law issue under Delaware law.

> We are of opinion that the prohibition declared in *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487, against such independent determinations by the federal courts extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. *See Erie Railroad v. Tompkins*, supra, 304 U.S. at 74-77, 58 S.Ct. at 820-822, 82 L.Ed. 1188, 114 A.L.R. 1487. Any other ruling would do violence to the principle of uniformity within a state upon which the *Tompkins* decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which

> leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent "general law" of conflict of laws. Subject only to review by this Court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law. Cf. *Milwaukee County v. White Co.*, 296 U.S. 268, 272, 56 S.Ct. 229, 231, 80 L.Ed. 220. This Court's views are not the decisive factor in determining the applicable conflicts rule. Cf. *Funkhouser v. J. B. Preston Co.*, 290 U.S. 163, 54 S.Ct. 134, 78 L.Ed. 243.

313 U.S. at 496-97. This holding clearly precludes this Court from granting the relief sought by Dorman.

This Court reaffirmed the holding of *Klaxon* in *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975). That case involved a claim for damages for death and personal injury arising out of an explosion in Cambodia. The district court, sitting in Texas, applied Texas substantive law and entered a judgment for the plaintiffs. The court of appeals affirmed. It declined to apply Texas choice-of-law rules, acknowledging that if it did so the substantive law of Cambodia would control some or all of the claims. This Court vacated the court of appeals judgment, holding: "A federal court in a diversity case is not free to engraft onto [state choice-of-law] rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits." 423 U.S. at 4.

These cases demonstrate that the relief sought by Dorman here is simply not available. The principles of federalism recognized and applied in *Erie*, *Klaxon*, and *Day & Zimmermann* do not permit this Court to establish different choice-of-law rules

than those correctly applied by the district court and the court of appeals below. This Court should deny the Petition for Writ of Certiorari.

CONCLUSION

Based on the arguments and authorities set forth above, Respondent Emerson Electric Company respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

Kenneth R. Heineman
(Counsel of Record for Respondent)
Bruce D. Ryder
One Mercantile Center
Suite 2900
St. Louis, Missouri 63101
(314) 621-8575

OF COUNSEL:
COBURN & CROFT